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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 947

GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

J. C. BUSENHART, et al.,

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District.

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Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District.

To: *The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:*

Your petitioners, Gerald A. Schroeder and Clara Johnson Schroeder, respectfully pray that a writ of certiorari be issued from this Court to review the judgment of the Appellate Court of Illinois, First District (from which a Petition for Leave to Appeal was denied by the Supreme Court of Illinois), entered in this cause.

OPINION BELOW.

No formal opinion was entered by the Circuit Court of Cook County.

The Opinion of the Appellate Court of Illinois, First District, is reported at 80 Ill. App. 2d 43, 225 N.E. 2d 702 (1967), and is attached hereto as Appendix A, pp. 1a-10a.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed is March 10, 1967, Appellate Court, First District (Petition for Leave to Appeal was denied by the Supreme Court of Illinois on September 26, 1967).

2. A timely petition for rehearing was filed in the Appellate Court. The Appellate Court denied the petition for rehearing on April 14, 1967. Illinois procedure makes no provision for rehearing of the denial of a petition for leave to appeal.

3. The jurisdiction of this Court is invoked under 28 U.S.C.S. Section 1257 (3).

The Opinion of the Appellate Court of Illinois, First District, is reported at 80 Ill. App. 2d 43, 225 N.E. 2d 702 (1967), and is attached hereto as Appendix A, pp. 1a-10a.

The Supreme Court of Illinois denied the Petition for Leave to Appeal without opinion.

QUESTION PRESENTED FOR REVIEW.

Did a decision of the Appellate Court of Illinois affirming an order of the trial court dismissing an action for conspiracy on the ground that it was barred by a prior judgment in condemnation and assessing attorneys' fees and costs against petitioners for making false statements in their pleadings violate the principles of due process of law secured by the 14th Amendment to the United States Constitution when no hearing was had by the Illinois Courts on the conspiracy or the alleged falsity and the parties and issues in the condemnation and conspiracy actions were not the same?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Involved here are the Fourteenth Amendment to the United States Constitution, (Appendix B, p. 11a); Art. II, Sections 2 and 13, Constitution of the State of Illinois, (Appendix C, p. 11a); and Chapter 110, *Illinois Revised Statutes*, (1965), Section 41, (Appendix D, p. 12a).

STATEMENT OF FACTS.

On or about December 11, 1963, Gerald A. Schroeder and his wife, Clara J. Schroeder, petitioners here, filed a conspiracy complaint for $1,000,000.00 in the Circuit Court of Cook County, Illinois, against some fifty individuals, respondents here, alleging the defendants had combined together to drive the petitioners out of business. The combination was alleged to have extended for a two year period prior to the filing of the complaint. The defendants were charged with having converted petitioners' property, having caused their removal from their real estate, and having assaulted and imprisoned the petitioners to effectuate the conspirators' ends.

Trustees of Schools of Township 42, a municipal corporation, sought leave to intervene, claiming it was the owner of the land on which the torts were alleged to have occurred and any decision by the Court might affect its title to the property. It prayed the court enter a judgment in its behalf against the petitioners in the amount of $28,231.63 for fees and expenses of litigation with petitioners in the instant litigation and litigation in the federal and state courts which it claimed was vexatious.

The School Trustees alleged that in 1959, it had filed a condemnation petition seeking fee simple title to the 18 acres of realty occupied by the petitioners on Rand Road, in Mt. Prospect, Illinois. The petitioners had filed a traverse denying the school district sought to take the land for public purposes and denying it had authority, under the Illinois statutes to acquire a fee interest in real estate.

This traverse was denied and the question of value then presented to a jury which returned a verdict of $267,083.33. After petitioners refused to agree to a remittitur, a new trial was ordered by the court. On appeal by petitioners, the Supreme Court of Illinois reversed the order for new trial, *Trustees of Schools* v. *Schroeder*, 23 Ill. 2d 74, 177 N.E. 2d 178 (1961), but refused to pass on the merits of the traverse since the appeal was from an order granting a new trial.

On remand, in October, 1961, the Circuit Court entered a judgment awarding fee simple title to the petitioner. A few days later, it entered an order directed to the Sheriff commanding him to put the School Trustees into possession. The Schroeders appealed both these orders to the Supreme Court of Illinois in November, 1961. In December, 1961, prior to a decision by the Supreme Court, petitioners were ousted from the realty and their business destroyed.

On appeal from the decree of October, 1961, the Supreme Court of Illinois decided adversely to petitioners the only issue raised by their then counsel, Messrs. Wahler and Pecyna, namely that a school district could not take land by eminent domain within 40 rods of the owners' dwelling. *Trustees of Schools* v. *Schroeder*, 25 Ill. 2d 289, 184 N.E. 2d 872. (1962).

Petitioners than retained new counsel, Alfred M. Loesser and Stephen Lee of the Illinois bar, who immediately sought to file an amended petition for rehearing with the Illinois Supreme Court reasserting the issues raised on the traverse and asserting that the taking of petitioners' property by virtue of the judgment of the Circuit Court of Cook County in eminent domain deprived the petitioners

of the rights secured to them by the Constitution of the United States. Leave to file this amended petition was denied and the petition for rehearing was denied on September 27, 1962, without opinion.

After the denial of their petition for rehearing, petitioners sought leave in the Circuit Court of Cook County to vacate the condemnation judgment and to stay the proceedings in condemnation, asserting that the school district was not taking the land for public purposes and the court had no power to award more than an easement for school purposes to so much of the land as might be necessary for those purposes. They sought to present evidence in support of that petition, but the court refused to hear evidence and denied the petition.

The School District sought a supplemental writ of possession during the pendency of the petition for rehearing which was issued by the court after the petition for rehearing was denied and the Circuit Court denied the petition to vacate its judgment. Petitioners appealed from these orders.

Meanwhile, petitioners and others sought leave to file a taxpayers' suit for an injunction restraining the school district from taking petitioners' land, charging on a number of grounds that the school district was proceeding in violation of the law. The Circuit Court denied leave to file that suit and an appeal was taken from that order. This appeal was combined with an appeal taken by petitioners from the orders refusing to vacate the condemnation order and issuing the supplemental writ. In *People ex rel. White* v. *Busenhardt, et al.*, 29 Ill. 2d 156, 193 N.E. 2d 850 (1963), the Circuit Court was affirmed. The

Illinois Supreme Court said, 29 Ill. 2d 156, 159, 193 N.E. 2d 840, 853 (1963):

> "In the eminent domain feature of this appeal, the Schroeders seek to raise the following issues:
>
> "(1) That the court had no jurisdiction to enter judgment for the taking of a fee-simple title;
>
> "(2) That the property is exempt from condemnation because of its location.
>
> "(3) That the ordinance (resolution) authorizing condemnation was void for lack of a quorum. * * *
>
> "(4) That there was abandonment of the project by failure to pay the award within 150 days * * * as directed; and,
>
> "(5) That the appeal bond was void."
>
> "All of these points could have been raised in the second appeal, in fact (2) above was conclusively litigated against the Schroeders, and they are now barred."

No petition for certiorari to the Supreme Court of the United States was filed seeking review of the decisions by the Supreme Court of Illinois. Instead, a complaint was filed in the Federal District Court for the Northern District of Illinois challenging the validity of the Illinois judgment and alleging violations of the petitioners' civil rights. This was dismissed by the District Court for want of jurisdiction; the dismissal was affirmed by the Seventh Circuit Court of Appeals, *Schroeder* v. *Illinois,* 354 F. 2d 561, (1966) and petition for certiorari was denied by the Supreme Court of the United States on June 6, 1966. *Schroeder* v. *Illinois,* 86 Sup. Ct. Reporter 1862, 3844 S 972.

The School Trustees pointed out the history of this litigation in its then posture and asked for the entry

of an injunction restraining petitioners from instituting or further prosecuting any litigation affecting the title to this land as well as a judgment for attorneys' fees.

Answers were filed to the plaintiffs' complaint by seven defendants. The school defendants filed no answers but joined with a number of the other defendants in a motion for summary judgment alleging that the court had judicial knowledge that the eviction of the petitioners was by action of the Sheriff pursuant to writ issued in the condemnation cause and that as a matter of law the court judicially knew the charges in the complaint that the defendants conspired to harm plaintiffs and their property could not be true.

A motion was filed by the school defendants and others under Rule 41 of the Illinois Practice Act. This charged that the allegations of petitioners' complaint asserting that the defendants conspired to destroy petitioners and evicted them pursuant to the conspiracy were untrue and were made solely to harass the Board of Education in their use of the real estate; that the complaint was only another of a series of maneuvers to vex the School Board; and that an action had been filed in the Federal Court since the filing of the conspiracy suit by the petitioners in an unlawful attempt to procure Federal Court review of legal proceedings of Illinois courts of competent jurisdiction. It asked that the court tax petitioners for reasonable expenses sustained by respondents in the defense of the conspiracy suit together with reasonable attorneys' fees.

On June 2, 1964, the Circuit Court granted the motion of the defendants for summary judgment. It denied the motion to tax reasonable expenses and attorneys fees.

The instant appeal by the petitioners from the order granting summary judgment followed. Respondents cross-appealed from the order denying their motion to tax costs and fees.

The petition for leave to intervene was denied but no appeal was taken from that order.

While the appeal for fees was pending, a suit for fees was instituted by the Trustees of Schools against petitioners in the Circuit Court of Cook County. The prayer for relief asked for fees for all expenses of litigation to date including fees and expenses in *Busenhardt*, and asked that the prosecution of both the appeal in *Busenhardt* and the action pending in the Federal Court be restrained.

The federal questions sought to be reviewed were first raised in the Petition for Rehearing filed in the Appellate Court of Illinois as points for reconsideration of its decision by this court. They were denied by that court's refusal to rehear the case. No opinion on the federal questions was issued by either the Appellate or Supreme Court. Because of the length of the argument, the petition for rehearing is attached hereto as Appendix E.

In the fall of 1962, the school district built a small intermediate grade school on ¼ acre of the 18 acre tract taken from the petitioners. The school building is located the maximum distance from the Rand Road frontage which is not being used for a school or school purposes.

REASONS RELIED ON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

In this case a state court has decided a federal question in a way which is in conflict with the applicable decision of this Court and the Constitution of the United States and has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT.

Fundamental to American jurisprudence is the right of a citizen not to be deprived of his property without due process of law. By this is meant a right to have a cause heard in a courtroom on evidence; and to have a decision made based on that evidence.

Without a hearing on the facts as to conspiracy, the Illinois Courts have decided that because a condemnation judgment was entered in a prior proceeding against petitioners, the petitioners are precluded from bringing conspiracy charges against persons not parties to the prior proceeding although the conspiracy charges were not and could not have been heard in the prior proceeding.

Similarly, the Appellate Court of Illinois, without hearing evidence, although the trial court refused to do so, found the allegations of petitioners' complaint alleging petitioners were the owners of the Rand Road real estate, to be false and vexatious and assessed fees and costs against petitioners for making the statements and referred the cause back to the trial court for the assessment of damages.

By their arbitrary actions in finding against the petitioners without a hearing, the Courts of Illinois have deprived the petitioners of the due process of law secured to them by the Fourteenth Amendment to the Constitution of the United States and Article II, Section 2, Constitution of Illinois, and certiorari is required to correct the action of these courts.

While two points are involved in this action; dismissal of the conspiracy charge and assessment of fees, both turn upon the same issue, the right to be heard.

Res Judicata.

The elements of *res judicata* in Illinois are set out in *Freeman on Judgments,* Sec. 252. To render a previous judgment a bar on an action, the prior judgment (1) must proceed from a court having jurisdiction, (2) be between the same parties; and (3) be for the same purpose. If it is not possible to raise the issues raised in the latter suit in the earlier suit, the previous judgment is not a bar. See *Oliver* v. *Oliver,* 313 Ill. 612, 145 N.E. 123 (1924), and *Deke* v. *Huenkemeier,* 289 Ill. 148, 152 (1919) 124 N.E. 381. Jurisdiction over the subject matter and parties, alone, is not sufficient to render a decree *res judicata, Hansberry* v. *Lee,* 311 U.S. 32 (1940). If the parties and causes of action differ, no bar arises. *Hooper* v. *U. S.,* 326 F. 2d 948.

In the instant case neither the same parties nor the same purposes were involved in the two law suits; the first being an action by a municipal corporation, Trustees of Schools of Township 42, against the petitioners in condemnation, and the second suit, an action by petitioners against some fifty specified individuals alleged to have participated in one or more torts committed against the petitioners. The first suit was a proceeding against land; the second, an action for conspiracy to destroy the petitioners' business.

It was impossible to raise the issues sued for in the latter suit in the earlier action because the Illinois courts do not permit examining the motives of officials in a condemnation action. *Deerfield Park District* v. *Progress De-*

velopment Corporation, 22 Ill. 2d 131 (1961); 174 N.E. 2d 850. Moreover, an eminent domain proceeding is not governed by the Illinois Practice Act.

Chapter 110, Ill. Revised Statutes, (1965) *Practice,* Sec. 1, provides:

> "The provisions of this Act apply to all civil proceedings * * * except * * * eminent domain. In all these proceedings the separate statutes control to the extent to which they regulate procedure (but this Act applies as to matters of procedure not so regulated by separate statutes)."

Chapter 47, Illinois Revised Statutes (1965), Eminent Domain, provides only for the determination of necessity of taking land and the valuation of the same; it makes no provision for hearing of consequential torts and a landowner is remitted to his action at law for the determination of miscellaneous damage to his property. *Horn* v. *City of Chicago,* 402 Ill. 549, 87 N.E. 2d 642 (1949).

Under these circumstances to apply the doctrine of *res judicata* to bar a hearing on the conspiracy action is a violation of due process of law. *Hansberry* v. *Lee,* 311 U.S. 32 (1940). Moreover, while a merely erroneous application of the doctrine of *res judicata* will not confer jurisdiction on the Supreme Court of the United States, the use of the doctrine of *res judicata* to destroy all remedies, as here has been done, is a denial of due process of law requiring correction by this Court. See *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 50 S. Ct. 451 (1930) at 454, where the Court said:

> "It is true that the Courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that the Court's power to review decisions of state courts is limited to their decisions on federal questions and that the

mere fact that a state court has rendered an erroneous decision on a question of state law or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.

"But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiffs on the merits, although it may be observed that the plaintiff's claim is one arising under the federal constitution and consequently, one on which the opinion of the state court is not final; nor with the accuracy of the statute. * * * Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it had an opportunity to present its case and be heard in its support. Undoubtedly the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review. But while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy unless there is or was afforded to him some real opportunity to protect it."

In *Young* v. *Ragen,* 337 U.S. 235 (1949), 69 S. Ct. 1073, 1074, the Court said:

"Of course we do not review decisions which rest upon adequate nonfederal grounds, and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights. *Loftus* v.

> *People of the State of Illinois*. But it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of federal right."

Moreover, where, as here, the judgments punish a petitioner for failing to follow a remedy never available to him, denial of due process is accomplished. *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 50 S. Ct. 451 (1930). The Appellate Court of Illinois commented, *Schroeder* v. *Busenhardt,* 80 Ill. App. 2d 431, (1967), 225 N.E. 2d 702 at 705:

> "The condemnation forum was the only forum in which to determine the issue of whether the taking was for a bona fide public purpose."

Because, said the Appellate Court, petitioners had not raised the issue of motive in the condemnation Court, the petitioners were barred from raising it in the conspiracy suit. But had petitioners attempted to raise the conspiracy issue in the condemnation proceeding, they would not have been heard! *Deerfield Park District* v. *Progress Development Corporation,* 22 Ill. 2d 131 (1961) 174 N.E. 2d 850. As said in *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 50 S. Ct. 451, (1929), at 435:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without it ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiffs' complaint and denied it relief not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

FALSITY OF STATEMENTS REGARDING OWNERSHIP.

Through the long years of litigation between the Schroeders and the School Trustees, there has never been an adjudication of the merits of the question of the jurisdiction of a Court to vest a fee simple title to realty in a school board. The law of Illinois is clear that a school district has no power to take fee simple title by eminent domain. See *Kelly, et al.* v. *Bowman, et al.,* 104 F. Supp. 973 (Eastern District Ill. 1952); affirmed 202 F. 2d 275, 276, (C.A. 7th 1953). In that case, the Court of Appeals adopted the district court opinion and stated:

> "Judge Casper Platt, by whom the case was tried, filed an opinion, *Kelly* v. *Bowman,* D.C. 104 F. Supp. 973, which contains an adequate statement of the facts, as well as a thorough analysis of the applicable Illinois law. Inasmuch as we agree with the result which he reached as well as the reasoning upon which it is predicated, we think no good purpose could be served in writing an opinion. We therefore adopt the opinion of Judge Platt as that of this Court."

The Appellate Court of Illinois in *Schroeder* v. *Busenhardt,* 80 Ill. App. 2d 431 (1967) 225 N.E. 2d 702 at 706, flatly states:

> "Defendants contend that it was error for the trial Court to deny their motion to tax against plaintiffs certain expenses and attorneys fees made necessary because of the allegations in the complaint (1) that defendants were members of a conspiracy to ruin the plaintiffs' business; (2) that the plaintiffs owned the condemned property after May 25, 1962, and (3) that the black surface soil on the property was converted by defendants. * * *"

"On the date of filing this complaint none of the above allegations could have been upheld because the Supreme Court had already determined that the school authorities, not the Schroeders, were the owners of the condemned property at the time in question. *Trustees of Schools* v. *Schroeder,* 25 Ill. 2d 289, 184 N.E. 2d 872. * * * While an unfounded claim of ownership might ordinarily not be the kind of statement covered by Section 41, it certainly becomes so after repeated judicial determination adverse to the claimant. And there is authority for the proposition that where as here, a suit is dismissed on the ground of *res judicata,* the sanctions of Section 41 will be imposed."

Res judicata is not a doctrine of substantive law. In *Hooper* v. *U. S.,* 326 F. 2d 982 at 985, it was said:

"We are taught by the Supreme Court that before the doctrine of *res judicata* is applicable as a bar to a second suit, not only must the parties be the same but also the second suit must be upon the same cause of action or demand of the original."

"We are also mindful of the fact that the application of *res judicata* and collateral estoppel is not required by constitutional law doctrine, but each is judicially developed restriction invoked in the name of public policy, requiring that a litigant be given only one day in Court. (*Commissioner of Internal Revenue* v. *Sunner, etc.*). It appears that where the public policy requiring the application of *res judicata* and collateral estoppel is outweighed by overriding considerations like Federal preemption or sovereign immunity, the Court has not adhered to the finality that would otherwise be given to the prior decree. We believe that an example of such an overriding consideration is present here, since a party should be given his day in a Court from which review by the Supreme Court might ultimately be afforded."

As under Point 1, to make a judgment *res judicata,* it must proceed from a Court having jurisdiction, between the same parties and be for the same purpose. We have never had an adjudication here that the condemnation Courts had jurisdiction; what we have had is the Courts of Illinois saying the fee question was *res judicata* because of failure to raise it. A former adjudication in condemnation is not an estoppel where the attempted proceedings were void. *McNutt* v. *City of Los Angeles,* 187 Cal. 249 (1921) 201, 592, *Montague County* v. *White,* Civil Appeals, Texas, 241 S.W. 740 (1922). A void judgment may be attacked at any time in any place, *Chapman* v. *American Surety Company,* 261 Ill. 594 (1941), notwithstanding the doctrine of *res judicata,* and if in fact, the Court was without jurisdiction to vest title to the realty in the School Board, plaintiffs are in truth and fact the owners of the real estate in question. Moreover, under the doctrine set forth in *Hooper, res judicata* is immaterial; a hearing on the merits is required to afford a review by the Supreme Court. If the failure to raise the defense does make it *res judicata,* under the doctrine in *Hooper* a hearing is still required to determine who owned the realty and whether the parties had conspired together and the refusal of the Illinois Courts to grant one is a deprivation of the rights to due process of law secured to petitioners by the 14th Amendment to the Constitution of the State of Illinois and Article II, Sections 2 and 13, Constitution of the State of Illinois.

CONCLUSION.

For all of the foregoing reasons we respectfully urge this Court to issue its writ of certiorari to review the decisions of the Appellate Court of Illinois, First District, in this matter. In this period of wide-spread abuse of personal rights, it is imperative that it be made clear that the law of the United States does not permit conviction without a hearing.

Respectfully submitted,

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